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5 and the putative class

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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **OAKLAND DIVISION**

10 TINA BATES, individually and on behalf of
a class of similarly situated individuals,

11 Plaintiff,

12 v.

13 SENDME, INC., a Delaware corporation,

14 Defendant.
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CASE NO. C 08 5361 SBA

**ORDER GRANTING PLAINTIFF
TINA BATES' MOTION TO
REMAND**

[28 U.S.C. § 1447(c)]

Date: April 7, 2009

Time: 1:00 p.m.

Judge: Sandra Brown Armstrong

Date Action Filed: September 9, 2008

No Trial Date Set

1 Defendant removed this action from the Superior Court for the State of California,
 2 County of San Francisco, to the United States District Court for the Northern District of
 3 California pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d).

4 For the following reasons, the Court finds that it does not have jurisdiction over this
 5 matter and therefore, the case should be remanded back to the San Francisco Superior Court.
 6

7 I. BACKGROUND

8 On September 9, 2008, Bates filed a putative class action complaint (“Complaint”) in
 9 the San Francisco Superior Court against Defendant Sendme, Inc. (“Sendme”). Bates alleges
 10 that Sendme is a “mobile content provider” that creates and distributes, among other things,
 11 music ringtones, wallpapers, games and news for use with cellular telephones and other mobile
 12 devices. (Compl. ¶¶ 5-6.) Bates further claims that when a consumer purchases content from a
 13 mobile content provider such as Sendme, the content provider forwards the consumer’s cell
 14 phone number along with the amount to be charged to a billing aggregator. (Compl. ¶ 10.) The
 15 aggregator, in turn, instructs the relevant cellular carrier to add the charge to the bill associated
 16 with that cell phone. (Compl. ¶ 10.) Bates alleges, *inter alia*, that Sendme engaged in a scheme
 17 with its industry partners to charge consumers for unwanted and unauthorized mobile content
 18 services. (Compl. ¶¶ 12-55.) Bates further alleges that Sendme could end this form of illegal
 19 billing in an instant:

20 All it would have to do to ensure that they are obtaining the consent of the
 21 charged party is agree to process a unique ‘access code’ for each customer
 22 account, provided by the carrier to the account holder and his/her authorized
 23 representatives at the time it is opened, and require that it be produced anytime a
 24 third-party attempts to charge the account. If a matching code is not provided, no
 25 charges would be included on the customer’s billing statement.

26 Compl. ¶ 35.

27 Bates alleges that in or about 2007, she was charged by Sendme for unwanted mobile
 28 content services on her cellular telephone bill in the form of premium text messages. (Compl. ¶
 51.) Plaintiff alleges that at no time did she authorize the transactions and at no time did

1 Sendme verify her purported authorization of the charges. (Compl. ¶ 52.) Bates alleges that
2 Sendme has not provided a full refund of the unauthorized charges, nor implemented any
3 adequate procedure to ensure that such unauthorized charges would not appear in future billing
4 periods. (Compl. ¶ 55.) Bates alleges that Sendme knowingly maintains a system that allows
5 for erroneous charges to retain its respective shares of the improper collections. (Compl. ¶ 36.)
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7 Bates brings this action on behalf of herself and a class of similarly situated wireless
8 subscribers in the nation who have suffered losses as a result of incurring unauthorized charges
9 on their cellular telephone bills from or on behalf of Sendme. (Compl. ¶ 56.) She asserts that
10 the proposed class consists of thousands of individuals. Bates asserts claims, on her own behalf
11 and on behalf of the class, for violation of the California Legal Remedies Act under California
12 Civil Code, section 1770, violation of California's Unfair Competition Law under California
13 Business and Professional Code section 17200, restitution/unjust enrichment, and tortious
14 interference with a contract. Bates seeks an injunction to protect her interests and those of the
15 putative class from Sendme's allegedly unfair and deceptive billing practices. She also seeks
16 economic, monetary, actual, consequential and compensatory damages, exemplary damages if
17 Sendme's conduct is proven willful, attorneys' fees and costs and pre- and post-judgment
18 interest on behalf of herself and the class.

19 On November 26, 2008, Sendme removed the case to this Court. In its notice of
20 removal, Sendme alleged that this Court has original jurisdiction over this action under CAFA.
21 Bates moved to have the case remanded to state court on December 29, 2008. Bates concedes
22 that Sendme has shown minimal diversity and that the lawsuit concerns over 100 persons. Thus,
23 Bates' instant motion to remand rests solely on the contention that Sendme has not met its
24 burden of showing, by a preponderance of the evidence, that the amount in controversy exceeds
25 \$5 million as required by CAFA.

26 II. LEGAL STANDARDS

27 Pursuant to 28 U.S.C. § 1441(a), often referred to as "the removal statute," a defendant
28 may remove an action to federal court if the plaintiff could have filed the action in federal court

1 initially. 28 U.S.C. § 1441(a); *see also Ethridge v. Harbor House Restaurant*, 861 F.2d 1389,
 2 1393 (9th Cir.1988). The removal statute is strictly construed against removal. *Id.* The matter
 3 therefore should be remanded if there is any doubt as to the existence of federal jurisdiction.
 4 *Gaus v. Miles, Inc.*, 980 F.2d 564, 565 (9th Cir. 1992).

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 6 Under CAFA, “[t]he district courts shall have original jurisdiction of any civil action in
 7 which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest
 8 and cost, and is a class action [with minimal diversity].” 28 U.S.C. § 1332(d)(2). “[U]nder §
 9 1332(d)(6), the claims of class members are aggregated to determine whether the amount in
 10 controversy exceeds \$5,000,000.” *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 684
 11 (9th Cir. 2006). When it is unclear or ambiguous from the face of a state-court complaint
 12 whether the requisite amount in controversy is pled, the removing defendant must establish by a
 13 preponderance of the evidence that the amount in controversy exceeds \$5 million. *Guglielmino*
 14 *v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007).

15 III. ANALYSIS

16 A. Compensatory Damages

17 Defendant argues that the amount in controversy should include Sendme’s total revenue
 18 generated from mobile content sales—a figure that exceeds \$5 million. Defendant cites *Spivey*
 19 *v. Vertrue, Inc.*, 528 F.3d 982 (7th Cir. 2008) in support of its argument. Def. Opp. at 6:9. In
 20 *Spivey*, the complaint alleged that Spivey’s credit card was charged without authorization and
 21 that Vertrue’s practices were common to all class members. *Id.* at 985. The complaint also
 22 alleged that making unauthorized charges was a standard practice at Vertrue. *Id.* The court held
 23 that the allegations put into controversy the propriety of all of Vertrue’s charges. *Id.* at 985-86.
 24 Sendme argues that the Complaint puts their total revenue in controversy because it alleges that
 25 Sendme “routinely processes charges for mobile content that have not been authorized by the
 26 charged party” and “has for years been systematically, repeatedly and without authorization,
 27 billing its customers for purchase of products and services not agreed to by those customers.”
 28 (Compl. ¶ 16.) Sendme argues that because the allegation essentially is aimed at Sendme’s

1 standard content delivery and billing system, it follows that as in *Spivey*, the entire revenue
2 should be included in the amount in controversy. Def. Opp. at 7:2-9.

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4 However, the Court concludes that Sendme characterizes the Complaint too broadly.
5 The Complaint alleges only that the Defendant's billing process increases the likelihood of false
6 charges being added to the cell-phone bills of consumers. (*See* Compl. ¶ 11.) Moreover, the
7 Complaint defines the class to include only "wireless telephone subscribers who suffered losses
8 or damages as a result of Sendme billing for mobile content products and services not
9 authorized by subscriber." (Comp. ¶ 56). The claim thus includes only *unauthorized charges*,
10 not *all revenues* from *all customers*. Sendme's total revenue does not establish that the amount-
11 in-controversy meets or exceeds \$5 million.

12 **B. Injunctive Relief**

13 There is no question but that along with the several prayers for damages Plaintiff
14 includes mention of injunctive relief, as well as declaratory relief. However, she does not
15 specify any particular injunctive relief. In her prayer for relief she seeks "injunctive and/or
16 declaratory relief as is necessary to protect the interests of Plaintiff and the Class". (Compl. p.
17 16, Prayer for Relief at ¶ f.). In the other paragraphs relied on by Sendme, plaintiff "seeks an
18 order enjoining Defendant's collective CLRA violations alleged herein, restitution of property
19 gained by the CLRA violations, and court costs and attorney's fees under the CLRA", (Compl.
20 ¶ 69); "seeks an order enjoining Defendant's unfair competition alleged herein, and restitution
21 of property gained by such unfair competition... (Compl. ¶ 71.) Nowhere does plaintiff specify
22 any particular injunctive relief.

23 Nevertheless, Sendme argues that the injunctive relief Bates requests is contained in
24 paragraph 35 and that the costs to Sendme of complying with the injunctive relief contemplated
25 in paragraph 35 exceeds \$5 million. In support thereof, Sendme submits a declaration by
26 Russell Klein, Sendme's Chief Executive Officer, to show the costs that would be incurred to
27 comply with paragraph 35. (See Dkt. No. 27).

28 The Court finds that Klein's declaration does not establish that at least \$5 million is at

1 issue in this case because it is based on a speculative premise, namely that paragraph 35
2 describes the type of injunctive relief being sought or likely to be granted. This relief is not
3 referred to specifically or even generally by any of the prayers for injunctive relief. It is, in fact,
4 nothing more than a suggestion of how Sendme could have, but failed to prevent unauthorized
5 charges. It precedes paragraph 36 which alleges that “instead of implementing such a simple
6 safeguard, Defendant ha[s] intentionally created, maintained, and promoted a system that
7 encourages fraud at every step.” (Compl. ¶ 36.) Thus, paragraph 35 merely suggests what
8 Sendme could have done to avoid this.
9

10 **C. Punitive Damages**

11 Sendme argues that punitive damages should be included when determining the amount
12 in controversy. (Not. of Removal, Dkt. No. 1, ¶ 16.) While Sendme is correct as to the
13 applicable legal principle, its argument is not dispositive in the instant dispute. An award of
14 punitive damages necessarily is related to the amount of compensatory damages awarded.
15 *Munro v. Golden Rule Ins. Co.*, 393 F.3d 720, 721-22 (7th Cir. 2004); *see also Abrego Abrego*,
16 443 F.3d at 689. As discussed above, the amount of compensatory damages to which the class
17 may be entitled is too speculative to be determined. Adding punitive damages to the equation
18 only increases the speculation.

19 **D. Attorneys’ Fees**

20 The parties agree that attorneys’ fees should be included in the amount in controversy,
21 but they disagree as to the proper estimation of the potential fees in this case. Bates contends
22 “the proper estimate of attorneys’ fees is the amount of fees incurred up until the time of
23 removal.” (Pl. Mot. at 6:27-28, 7:1-2.) Sendme argues that 25% of the common fund is a fair
24 estimate of attorneys fees” (Dkt. No. 1 ¶ 17.) and then asks the Court to take judicial notice of
25 attorneys’ fees awarded to Plaintiff’s counsel in settlements of allegedly similar cases as a basis
26 for determining the amount of fees in this action. However, Sendme provides no legal authority
27 for the proposition that attorneys’ fees awarded in those settlements should be considered in
28 calculating the amount in controversy in this case. Further, even if the Court were to assume

1 that a reasonable estimation of potential damages could be reached at this time, Sendme does
2 not offer any showing as to how the attorneys' fees based on such damages would be calculated.
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4 **IV. CONCLUSION**

5 For the foregoing reasons, plaintiff's motion to remand is **GRANTED**. The Clerk of
6 Court is instructed to transmit forthwith a certified copy of this order to the Clerk of the
7 Superior Court for the County of San Francisco.

8 **IT IS SO ORDERED.**

9 DATED: 4/6/09

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11 HONORABLE SAUNDRA BROWN ARMSTRONG
12 UNITED STATES DISTRICT JUDGE
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